SUPREME COURT, U. S.

FILED

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JAMES R. BROWNING, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 416

THE AMERICAN NEWS COMPANY and
THE UNION NEWS COMPANY, *Petitioners,*

against

KING-SIZE PUBLICATIONS, INC., *Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## RESPONDENT'S MEMORANDUM IN OPPOSITION

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Dated: October 10, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The proceeding below was an appeal from an interlocutory order of the District Court granting a motion for a new trial. Petitioners had not complied with 28 U.S.C. § 1292(b) which reads as follows:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order

> involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. As amended Oct. 31, 1951, c. 655, § 49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770.

In the court below the respondent moved to dismiss the appeal on the ground that the Court of Appeals had no jurisdiction without the statement of the trial judge provided in the above statute. The appeal was docketed and dismissed.

It is apparently petitioners' contention that it is unnecessary for them to exhaust the remedy which Congress gave them under which they conceivably might have induced the court below to grant them their appeal. They say that the action of the lower court was "so basically destructive of the right to trial by jury as to present constitutional questions of due process which are final in all respects."

Thus this Court is asked to decide a constitutional question which might not have arisen if petitioners had asked the trial court to include a statement in his order on the basis of which an appeal might have been taken, and which will never arise in this case if

judgment is given for the petitioners on the second trial. It seems to us inconceivable that certiorari can be granted on these grounds in the light of this Court's repeated statements that constitutional questions will be avoided unless the procedure below compels the Court to consider them.

Apart from this insurmountable procedural barrier which prevents this Court from deciding the constitutionality of the order granting a new trial, the substance of petitioners' contentions seems equally frivolous. It is well settled that an order granting a new trial is not a "final decision" appealable as a right under 28 U.S.C. § 1291; *Frank Mercantile Corporation* v. *Prudential Insurance Company of America*, 115 F. 2d 496, 497 (C.A. 3, 1940); 6 Moore Fed. Prac. 3896 and cases cited. The rule is no different because the order granting a new trial is based on misconduct of the jury. *Aluminum Company of America* v. *Loveday*, 273 F. 2d 499 (C.A. 6, 1959); *Aubertin* v. *State Farm Mutual Automobile Insurance Company*, 252 F. 2d 96 (C.A. 5, 1958). Furthermore there is no constitutional right for an appeal from an interlocutory order except when "it would practically defeat the right to any review at all." *Cobbledick* v. *United States*, 309 U.S. 323, 324-325 (1940). Here petitioners will not be deprived of a review. The order granting a new trial can be appealed after final judgment.

The cases cited by petitioners are so clearly not in point that we think it unnecessary to anaylze them.

We therefore urge that the petition for writ of certiorari be denied.

Respectfully submitted,

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